DUBBIN & KRAVETZ LLP

SAMUEL J. DUBBIN, P.A.
DIRECT (305) 357-9004
sdubbin@dubbinkravetz.com

July 21, 2006

The Honorable James Orenstein
United States Magistrate Judge
225 Cadman Plaza East
Brooklyn, New York 12101

Re: U.S. Holocaust Survivors' Letter Brief in Opposition; *In re Holocaust Victim Assets Litigation*; *Application of Burt Neuborne*, Case No. CV-06-983

Your Honor:

This letter brief is filed on behalf of David Schaecter, Leo Rechter, David Mermelstein, Alex Moskovic, Esther Widman, Fred Taucher, Jack Rubin, Henry Schuster, Anita Schuster, Herbert Karliner, Lea Weems, Israel Arbeiter, Sam Gasson, Nesse Godin, "G.K.," "F.K.," L.K.," and the Holocaust Survivors Foundation USA, Inc. ("U.S. Survivors"). The individual objectors are Holocaust survivors and members of the Looted Assets class in the Swiss bank class action.[1] This letter brief responds to the Court's Order of May 18, 2006 ("March 2006 Opposition Memo") and request for succinct letter briefs on certain remaining issues. It is without prejudice to the continued viability of the points raised in the U.S. Survivors' March 17, 2006 Superseding Objections (excluding the facts now subsumed by stipulations), which are omitted from this document in the interest of space.

I. Notice to the Class.

The U.S. Survivors rely on their argument in their March 17, 2006 Opposition Memo regarding notice to the class. They favor a mechanism to inform class members of their rights to file objections, if any, under Federal Rule of Civil Procedure 23 (h)(1) which should be achievable for an amount in the range of $50,000-$100,000.

II. Judicial Estoppel.

The objectors challenged Mr. Neuborne's representation of competing classes of Holocaust survivors, the fairness of the process he devised, and the allocation of

[1] Most of the individual survivors objecting are elected leaders of bona fide grass roots Holocaust survivor groups throughout the United States. HSF is an umbrella organization of survivors and survivor groups organized under Delaware law and recognized by the Internal Revenue Service under section 501(c)(3).

settlement proceeds among members of the Looted Assets Class, especially the allocation of 75% of the looted assets funds to the Former Soviet Union and a *de minimis* allocation for class members in the United States. Throughout the proceedings, Mr. Neuborne made his *pro bono* representation and the resulting "fair allocations process" the center piece of his response to these challenges, and the district court and the Second Circuit embraced those representations in their decisions approving the settlement and allocations. Nevertheless, in November 2005, soon after the Second Circuit affirmed the district court's second and third allocations, Neuborne filed a request for $4.1 million for work dating back to January 1999.

In now reversing course and now seeking fees for "post-settlement work," Mr. Neuborne is barred by the doctrine of judicial estoppel from recovering fees from the settlement fund. *Simon v Satellite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997)("Judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding."); *AXA Marine and Aviation Ins. Ltd. v. Seajet Ind.*, 84 F.3d 622, 628 (2d Cir. 1996)(party who advanced an inconsistent factual position in a prior proceeding that "was adopted by the first court in some manner" is barred from changing positions.).

Neuborne's Pro Bono Representations. In November 1999, Mr. Neuborne filed a Declaration asserting that the fairness of the proposed settlement and allocation process was assured due to the absence of any conflict of interest in his representation of all classes. He specifically represented that he was serving as Lead Plaintiff's Settlement Counsel "without fee:"

> I . . . serve, pursuant to the Court's order, as Lead Settlement Counsel in connection with the implementation of the settlement agreement. In that capacity, I have worked closely with counsel for the plaintiffs . . . in formulating and implementing the notice program, and with the Special Master, Judah Gribetz, Esq., in preparing a plan of allocation and distribution. . . . *I am serving without fee.*"

Declaration of Burt Neuborne, November 5, 1999, at 1-2, para. 1 (emphasis supplied). A copy of the Declaration is attached as Exhibit 1.[2] This Declaration was filed nearly 10 months after he now claims he began working in expectation of lodestar compensation, January 26, 1999, the date the Settlement Agreement was signed. Neuborne March 17, 2006 Declaration, Exhibit C.

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2 Many of the documents containing Mr. Neuborne's "pro bono" statements are listed in note 8 of the U.S. Survivors' Superseding Objections dated March 17, 2006 ("March 2006 Opposition Memo") and filed as exhibits thereto. Several other cited documents were not attached because they were pleadings in the case but now that the original judge has recused himself, the U.S. Survivors are including those pleadings and as exhibits for the Court's convenience in the attached Notice of Filing Exhibits to U.S. Survivors' July 21, 2006 Letter Brief.

Later in the same Declaration, explaining why he could represent the entire class even though disparate groups were competing for the same limited pool of funds, Professor Neuborne stated that he was at the time providing services pro bono and he had waived "all attorneys' fees."

> *Key members of the plaintiffs' executive committee who negotiated the settlement are providing their services on a pro bono basis,* . . . [some have requested payments in lieu of fees to foster human rights law]. *Numerous lawyers, including Lead Settlement Counsel, have waived all attorneys' fees*. . . . No possibility exists, therefore, of a significant financial conflict of interest between counsel and any class member.

Id. at 18, para. 28 (emphasis supplied).

It was equally clear in his November 1999 Declaration that Mr. Neuborne's alleged "pro bono" status was central to the allocation phase of the case, because it created a "fair allocation process" guaranteed by the role to be played by "pro bono" class counsel such as himself. He said:

> While such an effort to temper the formal adversary process by imposing overlapping, non-adversary responsibilities on counsel may not be appropriate in other settings, under the unique circumstances of this litigation, the fourfold safeguards of (a) *dedicated pro bono lawyers pledged to assist in the development of the fairest plan of allocation*, ... [(b) a "neutral" Special Master, (c) procedures encouraging participation by class members, and (d) the District Court's supervision] satisfies Rule 23, the commands of due process, and the ethical considerations of this unique effort to invoke the class action mechanism . . . .

Neuborne November 1999 Declaration, at 21, para. 34 (Emphasis supplied).[3] Obviously, the allocations phase can not be deemed "pre-settlement" since allocations decisions were made in 2000, 2002, 2003, 2004, and remain open to this day.[4]

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[3] Mr. Neuborne's time records reflect that he was expecting compensation even for drafting that very November 1999 declaration. See Neuborne Declaration, Exhibit C, and for numerous discussions with the Special Master and the District Court concerning allocations. *See* note 19 of Survivors' March 2006 Opposition Memo.

[4] Mr. Neuborne's Declaration in support of his fee request on March 17, 2006 recalls this Declaration quite differently: "In my capacity as Lead Settlement Counsel, I . . . submitted three declarations supporting the settlement's fairness, explaining the pre-commitment strategy, and responding to objections posed to the settlement. . . . The declarations explained why the existence of financially unconflicted *pro bono* counsel *during the pre-settlement negotiations* phase distinguished this settlement from the failed settlement in Amchem. . . ." Neuborne March 17, 2006 Declaration at 46 (emphasis supplied). Somehow, the "safeguard of dedicated pro bono lawyers pledged to assist in the development of the fairest plan of allocation" in his November 1999 Declaration has been dropped and forgotten. Today, apparently, with millions in fees possibly on the line, only the "pre-settlement negotiations" needed the class lawyers to be "pro bono."

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Mr. Neuborne repeated or referenced these claims throughout the litigation, before the district court and the Second Circuit, in defense of the Special Master's recommended allocations and in defense of the Court's approval thereof. *See, e.g.* Supplemental Declaration of Burt Neuborne in Support of An Application for an Order Pursuant to Rule 23(e) Approving The Settlement Agreement As Fair, Adequate, and Reasonable, June 26, 2000, Exhibit 2, at 7, paragraph 12; November 20, 2000 Submission of Lead Plaintiffs' Settlement Counsel, Exhibit 3, at 3 and note 1; August 22, 2002 Declaration of Lead Settlement Counsel in Support of Special Master's Supplemental Allocation Recommendation; Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel J. Dubbin, Esq., November 14, 2003, Exhibit 4, at 31 and note 23; February 20, 2004 Affirmation of Burt Neuborne., Exhibit 5.

The District Court and Second Circuit Cited Neuborne's "Pro Bono" Status. The District Court adopted Mr. Neuborne's argument regarding the settlement structure in its August 2000 fairness decision and rejected the contention that separate counsel should have been appointed for classes with conflicting interests. It held "a 'divided loyalty' structural concern is absent from this case . . . [because] plaintiff's lead settlement counsel [has] waived all attorneys fees." *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139, 146 (E.D.N.Y. 2000). The relevant excerpt is included as Exhibit 6.

In November 2000, the District Court adopted the Special Master's initial allocation recommendation, and overruled objections from the U.S. Survivors that Looted Assets Class members in the United States were not treated fairly in the allocation of 75% of the funds to the Former Soviet Union. In so doing, the court relied on the "fair allocations process" described in Mr. Neuborne's submissions and also cited its fairness decision. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 *1, *4 (E.D.N.Y. Nov. 22, 2000), attached as Exhibit 7. Later, in March 2004, approving the second and third supplemental allocations, the District Court expressly relied on Mr. Neuborne's 2003 Supplemental Declaration. *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, 92 (E.D.N.Y. 2004). The relevant excerpt is attached as Exhibit 8.

On appeal, the U.S. Survivors challenged the Looted Assets class allocations based in part on the court's failure to appoint separate counsel and Mr. Neuborne's decision to defend the district court's decisions rather than advocate for the rights of Looted Assets class members. Mr. Neuborne's answer brief directly referenced his "pro bono" status in defense of both his actions and the trial court's decisions. He stated that the District Court had found:

> Lead Settlement Counsel had no economic motive to favor one or another category of victims, or to sacrifice the interests of any group of survivors in order to achieve a financially advantageous settlement.

Id. at 60-61. He continued:

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> Accordingly, *the District Court requested Lead Settlement Counsel, with the assistance of other pro bono members of plaintiffs' Executive Committee, to serve the interests of all members of the plaintiff-classes without adopting an adversary posture towards any group of survivors.*[5]

Answer Brief of Burt Neuborne in *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit ("Neuborne Answer Brief"), at 61-62. *See also* Neuborne Answer Brief at 6, 13-14, 21, 27, 49, and 52. These excerpts are included as Exhibit 7 to the Survivors' March 2006 Opposition Memo.

The Second Circuit Court of Appeals affirmed the allocations, relying in part on the reasoning of the district court centered on Neuborne's "pro bono" status and the "fair allocations" process argument. The Second Circuit quoted from the District Court's fairness finding which had stated that Professor Neuborne was serving as a lawyer for class members "without fee." *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 138 (2d Cir. 2005). The Second Circuit's opinion also quotes from Mr. Neuborne's explanations of the "fair allocation process" he devised to justify the allocations process and result. *Id.*, at 137. Relevant excerpts are attached as Exhibit 9.

Consequently, with Mr. Neuborne's numerous representations that he was serving "pro bono" for all phases of the case, including the allocations phase, and the District Court's and Court of Appeals' decisions expressly referencing his pro bono status and adopting and affirming the outcome of the "fair allocation process" that Mr. Neuborne's "pro bono" status supposedly conferred, the elements of judicial estoppel are met. *Simon* and *Axa Marine, supra.*

Mr. Neuborne's Factual and Legal Arguments Do Not Overcome the Elements of Judicial Estoppel. Mr. Neuborne attempts to counter the U.S. Survivors' objections with various factual and legal arguments in his January and March 2006 declarations and memoranda.

Factual Claims. Factually, Mr. Neuborne argues he disclosed his intention to seek fees in a law review article published in 2002, which states in the last line of the third paragraph of footnote 21 that "hourly payments for post settlement work needed to administer the settlement fund will be sought." He also cites a January 2001 transcript which allegedly "discloses," though certainly not by any statement of Neuborne's, that he would be seeking "post settlement" fees. For reasons set forth in the U.S. Survivors' March 17, 2006 Opposition Memorandum at 19-25, these factual claims are wholly unpersuasive.

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[5] *Id.* at 60-61 (Emphasis supplied), quoting the District Court's fairness opinion which cited Neuborne' pro bono status and his November 1999 declaration, 105 F.Supp.2d at 146, 150-51.

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In short, Mr. Neuborne's claims that he publicly disclosed that he would be seeking fees for "post settlement work" in January 2001 (*two years* after he now says he began working for compensation) are impossible to reconcile with his continuous in-court statements about his "pro bono" status in the Swiss case cited above in 1999, 2000, 2001, 2002, 2003, and 2004.

Moreover, not long after the January 2001 hearing, Mr. Neuborne reiterated his *pro bono* role in the allocations process in a Second Circuit brief in June 2001 in *Lenini v. Friedman*, [Appeal Nos. 00-9217, 9593, 9595, 9612, 9613], when he was defending against the objections of Romani class members to the Looted Asset Class allocations:

> Since key settlement counsel were working without fee, the District Court found that *pro bono* settlement counsel were capable of presenting conflict free information and legal analysis to the Special Master concerning each class without the highly inadvisable step of pitting categories of elderly Holocaust victims against each other.

2001 WL 34117787 at *22, note 51. The excerpt from Mr. Neuborne's *Lenini* brief is found at Exhibit 22 to the Survivors' March 2006 Opposition Memo.

In February 2002, Mr. Neuborne, defending his own right to retain the $4.5 million fee he personally received from the German Foundation in *Zeisl v. Watman*, [Appeal No. 01-9229], Mr. Neuborne represented to the Second Circuit that he "had appeared *pro bono* in the Swiss bank *litigation.*" (emphasis added). This excerpt from Mr. Neuborne's *Zeisl* brief is included as Exhibit 23 to the Survivors' March 2006 Opposition Memo.

And, as recently as September 2005, at a hearing in the U.S. District Court for the Southern District of Florida, in front of several Holocaust survivors including some who are objectors here, Mr. Neuborne declared:

> I served without fee in the Swiss case. I am the Lead Settlement Counsel in the Swiss case in which I served without fee for almost seven years.

Transcript of fairness hearing in *Rosner v. United States of America*, Case No. 01-1859 (S. D. Fla.) at 28-29, Exhibit 10 to the Survivors' March 2006 Opposition Memo. This in-court statement occurred merely *two months before* Mr. Neuborne filed his fee request for those same seven years.

Mr. Neuborne also argues that he was careful to distinguish between pre- and post-settlement work when describing his pro bono status. First , these claims are simply not true as documented above. Further, to the extent there were time he used "careful wording" such as stating he was pro bono "in connection with obtaining the settlement," such expressions might generously be regarded as a half-truths. He *never* stated in a court filing that he intended to seek fees for post settlement work until he filed his fee request *in November 2005*. If his status had changed sometime after January 1999 as he now claims, he had an affirmative duty to say so, but never did. *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)(counsel has a "continuing" duty of candor to the tribunal, to the parties, and to the judicial system).[6] No court should countenance such cleverness by an officer of the court, most certainly not when the lack of candor involves the rights of Holocaust survivors.

In short, since Mr. Neuborne's current arguments conflict with his prior in-court statements which were adopted by the District Court as well as the Court of Appeals, he is judicially estopped to change his position now in order to reap a huge financial reward.

Legal Arguments. Mr. Neuborne's legal opposition to the Survivors' judicial estoppel argument is based on a non-existent principle, i.e. that the application of the doctrine of judicial estoppel requires "detrimental reliance." He argues: "the one essential aspect of any invocation of estoppel – the existence of a false statement that induces detrimental reliance – is completely absent from this case." Memorandum of Law in Support of Lead Settlement Counsel's Application for an Award of Counsel Fees for Post-Settlement Services Provided to the Settlement-Classes ("Neuborne March 17, 2006 Memo"), at 20. This argument is simply not a correct statement of the law, and Neuborne's emphasis on the element of detrimental reliance reflects the vulnerability of his position to the application of judicial estoppel to his fee request.

The elements of judicial estoppel in the Second Circuit are set forth in *Simon* and *Axa Marine*, *supra,* and do not include "detrimental reliance." The doctrine of judicial estoppel is premised on the protection of "the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment" *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). There is no element of "detrimental reliance" required. In fact, every judicial circuit to address the question has held that detrimental reliance is *not* an element of judicial estoppel. *See, e.g. Crewboats, Inc. v. P & I Underwriters*, 374 F.3d 330, 334 (5th Cir. 2004)("Importantly, because judicial estoppel is designed to protect the judicial system, not the litigants, detrimental reliance by the party opponent is not required."); *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282 (11th Cir. 2002)(same); *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773 (3rd Cir. 2001)("Privity and detrimental reliance – prerequisites for the application of equitable estoppel – are not required for invocation of judicial estoppel."). *See also National Westminster Bank USA v. Ross*, 130 B.R. 656 (S.D.N.Y. 1991)("reliance is not a necessary element of the doctrine of judicial estoppel").

The two cases relied on by Mr. Neuborne, *New Hampshire v. Maine* and *Cleveland v. Policy Mgt Sys*., 526 U.S. 795 (1999), do not provide that "detrimental reliance" is an element of judicial estoppel. The phrase "detrimental reliance" does not appear in either of these opinions. Nor does it appear in any recently reported (or other) Second Circuit case applying the doctrine of judicial estoppel. In addition to the cases cited above, *see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir. 2005); *Stichting Ter Behartiging Van de Belangen van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l, B.V. v. Schreiber,* 407 F.3d 34 (2d Cir. 2005); *Rodal v. Anesthesia Group of Onondaga, P.C.,* 369 F.3d 113 (2d Cir. 2004); *Mitchell v. Washington Central School District*, 190 F.3d 1 (2d Cir. 1999).

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[6] The courts have held that where an officer of the court has a duty of candor to the tribunal, even silence may constitute fraudulent concealment. *E.g., American Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1460 (7th Cir. 1996); *Guardian Life Ins. Co. v. Handel*, 596 N.Y.S.2d 304; 190 A.2d 57 (1993). Mr. Neuborne's fraudulent representations to the courts were overt, however. The only silence was his never-mentioned understanding acknowledged in 2006 by the District Court that they had "agreed' Professor Neuborne would be compensated for "post settlement" work.

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the U.S. Supreme Court identified certain factors which "typically inform" the decision whether to apply judicial estoppel in a particular case. *Id.*, at 750. According to the Court, these factors are: "First, a party's later position must be 'clearly inconsistent' with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.' . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.*, at 750-751 (citations omitted).[7]

Clearly, all three elements referenced by the Court in *New Hampshire* are present here. First, Mr. Neuborne's current argument that he was acting pro bono only in pre-settlement matters is clearly inconsistent with his prior judicial statements, including statements months and years after he now contends he began working for compensation, that he was "serving without fee," had "waived all fees," and that "pro bono" settlement counsel would represent the entire class on allocations issues – which occurred in 2000, 2002, 2003, and are pending even today. Second, his pro bono status and the "fair allocation process" that status allegedly imparted was accepted and cited by the District Court and the Court of Appeals. Third, it is obvious that Mr. Neuborne would derive an unfair advantage after brandishing his "pro bono" status to justify the denial of any

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[7] Neuborne's attempt (at page 21) to portray the Supreme Court's decision in *New Hampshire v. Maine* as involving "detrimental reliance" is unavailing. The Court "relied" on New Hampshire's prior position making it part of a binding judicial decision. In so doing, the Court simply found the prior stipulation and order satisfied the requirement that a court must adopt in some way the prior representation for judicial estoppel to apply. The Court held: "Having convinced this Court to accept one interpretation of "Middle of the River," and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense. Were we to accept New Hampshire's latest view, the 'risk of inconsistent court determinations," . . . would become a reality. We cannot interpret 'Middle of the River' in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process." *Id.*, at 755.

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meaningful benefits from the settlement to U.S. Survivors in the Looted Assets class. He would now benefit by personally receiving millions of dollars from the very same settlement funds which the District Court held are too limited to provide greater sustenance for poor, elderly U.S. survivors in the class who cannot afford food, rent, medicine, and other necessities from a legal settlement that compromised their claims. If the personal windfall that would result from this 180 degree turnabout achieved only by repudiating the very facts he relied upon to achieve the results he now claims represent "success" for the class is not an unfair advantage, nothing is.

Conclusion. For the foregoing reasons, the U.S. Survivors respectfully submit that Mr. Neuborne is precluded under the doctrine of judicial estoppel from claiming fees from class settlement funds in this case.

III. Reasonable Hourly Rate.

Introduction. If Mr. Neuborne is not judicially estopped from recovering fees (and without prejudice to their argument on judicial estoppel), the U.S. Survivors submit that a "reasonable" hourly rate for Mr. Neuborne, a tenured law professor with a New York University Law School salary and no overhead or expenses, is between $200 and $380 per hour.

While the parties' discussions have used the term "academic discount," the reality is more complex. To be sure, an aspect of the U.S. Survivors' opposition to Mr. Neuborne's claimed $700 hourly rate is Mr. Neuborne' status as an tenured law professor with a full-time academic salary (paying him less than $200 per hour) and no overhead or risk, as noted in their prior filings. But there are other factors affecting this analysis.

This is not a typical common fund situation, such that Mr. Neuborne deserves compensation to prevent "unjust enrichment" of the class. Nor does this case involve a fee shifting statute, which courts have held require a *plaintiff* (not a court-appointed lawyer) to receive compensation at the "prevailing market rate" irrespective of the lawyer's actual market rate and actual cost structure. And, Mr. Neuborne's references to a "market rates" reflecting what a "well informed client would agree to hire a lawyer," Memo at 6, have no applicability since Mr. Neuborne did not have any agreement with the class members regarding payment. He in fact stated for years he was working pro bono, and it was the District Court who, the class only recently learned, struck a deal to pay him at a future date on a 'lodestar" basis without any specified rate.

Finally, Mr. Neuborne seeks to be paid from the existing settlement funds in the Swiss bank class action. His fees would come at the expense of class members who neither retained him nor believe he rendered any benefit to them. His massive fee request is especially disrespectful to class members such as the U.S. Survivors, considering that Mr. Neuborne decided to defend the District Court's "exercise of discretion" rather than to advocate for class members -- particularly those living in the United States and Israel – when the District Court held the available funds were too meager to allow for more than a *de minimis* amount of assistance for poor Holocaust Survivors in the United States who

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cannot afford basic life-sustaining services such as food, medicine, home care, rent, heat, and other basic needs.[8]

Calculation of a Reasonable Hourly Rate. The Survivors begin with the parties' stipulation that, as a tenured law professor at New York University School of Law, Mr. Neuborne's rate of compensation is **$187.50 per hour**. The parties stipulated that his salary is $300,000 per year, and that the law school requires a minimum of 1600 hours toward his academic responsibilities.

Agent Orange Analysis. In *In re Agent Orange Product Liab. Litig.*, 611 F. Supp. 1296, 1330 (E.D.N.Y. 1984), *aff'd* 818 F.2d 226, 230 (1987), Judge Weinstein held that a reasonable hourly rate for a law professor seeking compensation from a common fund in a class action settlement is half-way between the rates recognized for law firm partners and law firm associates. This holding was affirmed by the Second Circuit. In so holding, Judge Weinstein distinguished the same case relied on here by Mr. Neuborne, *Blum v. Stenson*, 465 U.S. 86 (1984), on several grounds. One reason was that "the *Blum* Court's decision was based on legislative intent, a ground that is absent in common fund cases." *Id.*, at 1330. It added that use of a lower rate for professors "reflects the practical differences between the situation of the professors and those of private attorneys. Involvement in this case from the law professors' point of view presented relatively little risk. Professors do not depend on practicing law for their livelihood. . . . Professors do not need the kind of bread and butter work that a practicing lawyer requires." *Id.*

In addition, the court held that the lower rate takes into account the fact that professors, unlike the other attorneys, did not have substantial overhead costs during the five-year period of this litigation. . . . [C]ertain costs of running a law office . . . must be absorbed into the lawyers' hourly rate." It added that the difference between the professors' rate and that of the private attorney "reflects this reality." *Id*, at 1330.

In *Agent Orange*, therefore, Judge Weinstein held that an appropriate hourly rate for the academics who participated in the case was $125 per hour. In the same analysis, it held that the reasonable rate was $150 for law firm partners and $100 for law firm associates. Therefore, one measure of a "reasonable rate," applying Judge Weinstein's model, is the current mid-point between partners and associates at private law firms.

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[8] The District Court held there are not sufficient funds available to provide poor Holocaust Survivors in the Looted Assets class in the United States with more than $700,000 per year for these services, despite documentation in the record that the unmet needs of Survivors exceed $70 million every year. Yet every dollar received by Mr. Neuborne will perforce come at the expense of a poor Holocaust survivor who cannot afford basic life service, whether in the U.S., Israel, Europe, or elsewhere.

At this time, any additional amounts that might remain to augment the current stream of Looted Assets funding is still uncertain, and there has been no accounting for accumulated interest and expenses in nearly three years.

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According to prominent law firm management authority Altman-Weil, the ninth decile (highest) standard hourly billing rate for partners with over 31 years experience in New York State as of January 1, 2005 is $490 per hour. Excerpts from this publication are attached as Exhibit 16 to the Survivors' March 2006 Opposition Memo. Further, according to the New York State Bar Association publication *Economics of Law Practice in New York State, 2004*, equity partners in large New York City firms with over 35 years experience in the 95th decile charge $510 per hour. Excerpts from this publication are attached as Exhibit 17 to the Survivors' March 2006 Opposition Memo. The average of the two surveys is $500 per hour, which the U.S. Survivors contend is the proper "prevailing market rate" for the most experienced partners in New York firms with over 30 years experience. According to both the Altman-Weil survey and the New York State Bar survey, the top rate for a 4-5 year associate in New York is $270 per hour. The mathematical mid-point between the two rates is $380 per hour. Therefore, treating Mr. Neuborne as among the highest compensated and most experienced private lawyers in New York, the maximum hourly rate Mr. Neuborne could receive in a class case under Judge Weinstein's analysis would be **$380 per hour.**[9]

Deduction for Typical Law Office Expenses. Mr. Neuborne's lack of comparable New York City overhead or other expenses or business risk is also fatal to his claim of $700 per hour. According to the 2005 law firm financial benchmarking survey performed by RSM McGladrey, a leading law firm accountant and consultant in New York, net income as a percentage of fees collected by law firms in the Northeast United States in 2004 was 35.8%. This is consistent with the parties' stipulation that typical law firm office expense (rent, insurance, utilities) is 23%; the office expense plus non-legal personnel is 39%, and the cost of an office with non-legal personnel and associate salaries is 67%. *See* Exhibit 18 to the Survivors' March 2006 Opposition Memo.[10] Or, stated differently, the profit to a law firm after all expenses, including associate salaries, is 36%. Consequently, accepting Mr. Neuborne's argument that the comparable hourly rate for a lawyer of his experience and expertise would be $700 per hour, and assuming (unrealistically) that clients would pay a top partner at that rate for 1200 hours per year for over 6 years, the adjusted hourly rate using actual law office management data should be 35.8% of $700, or **$250 per hour**.

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[9] Mr. Neuborne contends that the proper reading of *Agent Orange* is that Judge Weinstein reduced the partners' market rate by 17% to obtain the law professors' hourly billing rate for the fee determination. Applying a 17% discount to the $500 per hour composite rate yields an hourly rate for Mr. Neuborne of $415. As shown below, Mr. Neuborne's argument that Judge Weinstein "immediately offset" the academic discount for low overhead by a 1.5 multiplier for "excellence" is not supported by the case.

[10] Mr. Neuborne argues that because associates' generate income for partners, a calculation deducting their salaries from a law professor's market rate unfairly disadvantages law professors. But why should law professors who seek compensation from plaintiffs' settlement fund be entitled to receive hypothetical profits generated by associates they do not employ or based on salaries they do not pay? To the contrary, any "unfair disadvantage" is a direct result of the fact that law professors are not business people with the business risks – lease obligations, salary obligations, malpractice insurance, bank lines of credit – associated with law firm profits. Further, they enjoy many advantages in academia not shared by law firm partners. Therefore their "market" rates should not reflect the same financial elements as a law firm partner, just as Judge Weinstein recognized.

Representation of Court Is Not Compensable from Class Funds and Would be Paid by Administrative Office of U.S. Courts at $200 per hour. The District Court analogized Mr. Neuborne's services in this case to the situation in which a district judge is provided with private counsel by the Administrative Office of the U.S. Courts. Transcript at 9-11,citing Court's September 13, 2004 Memorandum. Under this construct, the maximum hourly rate that is "reasonable" is the maximum rate actually paid by the Administrative Office in such situations – **$200 per hour**. According to its regulations, the maximum amount the AO may pay private attorneys in a mandamus action, for example, is the maximum rate payable by the Department of Justice for private counsel. Exhibit 19 to March 2006 Opposition Memo. According to AO General Counsel Robert Deyling, that top rate is $200 per hour. That limitation, according to Mr. Deyling, is not published outside DOJ, and is not even published in writing for the AO. But Mr. Deyling stated, from personal experience, that **$200 per hour** is the maximum hourly rate payable by DOJ.

Mr. Neuborne's Alleged $700 Hourly Rate is Excessive.

There are many reasons why Mr. Neuborne's effort to charge Survivors $700 per hour comparable to some New York City big firm lawyers' rates, is outrageous on its face. These include his lack of overhead and other expenses, his full-time academic salary (paying him $185 per hour), and the lack of any business or litigation risk. Further, very few if any senior partners would be paid $700 an hour by normal clients for a case to which a lawyer billed over 1,200 hours per year for nearly 7 years. Clients would expect many of the tasks in such a matter to be handled by lower-cost partners and associates and paralegals, and most firms discount their rates for exceedingly time consuming arrangements, i.e. give clients discounted rates for a higher volume of work.

In addition, Mr. Neuborne has failed to meet his burden of establishing that $700 per hour is a "reasonable hourly rate" for him to charge to this one case. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 895 and note 11 (1984)(attorney seeking fees has the burden of establishing the reasonable market rate through satisfactory evidence). Having one client who pays him that rate and submitting affidavits from other lawyers who state their opinions that his skill is comparable to other lawyers who bill at that level is insufficient. As Judge Easterbrook explained in *Gusman v. Unisys Corp*., 986 F.2d 1146, 1150 (7th Cir. 1989), even in a statutory fee-shifting case, the appropriate market rate must be the attorney's true opportunity cost of taking a matter for which the statute provides compensation. The court noted that an attorney who worked 2,000 hours per year but only billed 100 hours at the rate of $250, and devoted the other 1,900 hours to civil rights litigation where his payment would be fixed by the court, did not have the same "market

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rate" as the attorney who worked 2,000 hours and billed 1,900 hours at a rate of $250 to paying clients and works 100 hours in civil rights cases. The former example describes Mr. Neuborne and undercuts his claim to a market rate of $700 per hour.

Mr. Neuborne's Responses to *Agent Orange*. Mr. Neuborne has two answers to *Agent Orange*. He claims the court "offset" the discount for low overhead with an excellence multiplier, and he invokes the doctrine of *Blum v. Stenson* to claim that discounts for a lower cost structure are proscribed. Both arguments fail.

Agent Orange Did Not "Offset" the Overhead Discount With a Multiplier. First, he attempts to limit the effect of Judge Weinstein's discount of the law professors' hourly rates by claiming, without textual support from the case, that Judge Weinstein awarded the professors in that case excellence multipliers of 1.5 "to offset [the]17% discount for low overhead." Neuborne March 17, 2006 memo at 4-5. Mr. Neuborne argues: "if the Court is inclined to impose a low overhead discount on academic lawyers, the clearly justified offsetting enhancement for excellence would immediately restore the lodestar to the existing level, and perhaps higher. See 611 F.Supp. 1329-30 (award of 1.5 multiplier for excellence offsets 17% academic discount for low overhead leaving academic lawyers with a net lodestar 20% higher than non-academics.)." Memo at 7.

However, as is clear from the court's opinion, Judge Weinstein did not "offset" the "academic discount for low overhead" with an "immediate 1.5 multiplier for excellence. The court said: "All the professors who devoted time to "Agent Orange" are recognized experts in their fields. A $125 hourly rate has been used to calculate their awards. . . . Each brought great skill, inventiveness and legal ability to this case. In recognition of the high quality of their work, a multiplier of 1.5 was assigned to all their compensable time." 611 F.Supp. At 1329. There was no "linkage" or offset between the rate reduction and the multiplier for excellence. Moreover, several private attorneys who received $150 per hour also received excellence multipiers in *Agent Orange*, contrary to Mr. Neuborne's argument. 611 F.Supp. at 1331-32.

The *Blum* Doctrine Does Not Apply Because This is Not a Statutory Fee-Shifting Case. In addition, Mr. Neuborne cites the recent Second Circuit decision in *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 2006 WL 1541473 (2d Cir. June 6, 2006), as "controlling precedent" prohibiting any reduction in an attorney's hourly rate due to "low overhead." *McDonald* involved fees under ERISA (29 U.S.C. Sections 1001 et. seq.). The court said that low overhead alone is not a valid reason certain attorneys should not be awarded a higher or lower rate, though it helps account for why some attorneys' charge more for their services. It added that, under *Blum v. Stenson*, the focus must be on "prevailing rates in the community for similar services by lawyers of reasonably comparable skill, expertise, and reputation." *Id.*, at note 6, citing 465 U.S. 895 and note 11.

There is nothing novel or remarkable about *McDonald,* which merely confirmed that under a fee shifting statute, Congressional policy calls for successful *plaintiffs* to recover fees from defendants with their lawyer's hourly lodestar rates to be determined

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without regard to any particular cost structure or overhead. The purpose of the rule is, as has been made clear in the case law, to prevent defendants from being unjustly enriched by the happenstance of the cost structure of the lawyer who handled a plaintiffs' successful prosecution of a statutorily compensable claim.

However, this is not a statutory fee shifting case, so *McDonald* is inapposite. The most analogous case remains *Agent Orange*, which was affirmed by the Second Circuit, 818 F.2d 145 (2d Cir. 1987). Nothing in the Second Circuit's *McDonald* decision casts any doubt on the continued viability of *Agent Orange*.

Nor is there any reason to apply the lodestar rate principles from *Blum and McDonald* to this case. The *Blum* doctrine is designed to impose appropriate litigation liability on culpable defendants. The Supreme Court has made it clear that under fee-shifting statutes "*it is the party, not the lawyer*" who is eligible for the fee awards. *Blanchard v. Bergeron*, 489 U.S. 87, 94-95 (1989); *Evans v. Jeff D.*, 475 U.S. 717 (1986)(emphasis supplied). *See also Venegas v. Mitchell*, 495 U.S. 82, 90 (1990)("In sum, Section 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer."). The doctrine is not available to diminish plaintiffs' recovery from an extremely limited settlement pool, based on artificially high hourly rates for a law professor with no true market rate.

Based on the foregoing, the U.S. Survivors submit that if Mr. Neuborne is not estopped to claim fees in this case, he should be limited to a range between $200 per hour and $380 per hour for the stipulated number of hours arrived at by the parties and the Court.

IV. **Compensation as General Counsel.**

The U.S. Survivors agree with Class Counsel Robert A. Swift's discussion of this issue., and agree that the decision in *Reed v. Cleveland Board of Education*, 607 F.2d 737 (6th Cir. 1979) forecloses the idea of a court retaining a lawyer to provide general legal advice. Moreover, it is unclear exactly which services rendered by Mr. Neuborne fit into this "general counsel" category. As the Court is aware, the parties have stipulated to a fixed number of hours so the legal concept can be decided and its impact on any possible fee determined without an excessive amount of factual litigation.

However, this issue raises one of the most troubling aspects of the case, because of its massive damage to the interests of the U.S. Survivors in the Looted Assets class -- Mr. Neuborne's stance as a defender of the Special Master and the District Court in their allocations preferences and his adversarial posture toward the class. In short, this issue crystallizes a great deal of the betrayal experienced by the U.S. Survivors through this process, a subject about which several of the objectors and others from the community have spoken out publicly in discussions triggered by the allocations issues and now the fee request. *See , e.g.* "Whose Money Is It, A Debate on Who Should Get Unclaimed Swiss bank Funds between Thane Rosenbaum and Burt Neuborne," *The New York Jewish Week*, May 7, 2004, Exhibit 10, and Letters of Leo Rechther, Alex Moskovic, and

Fred Taucher regarding Neuborne fee request published at http://prawfsblawg.blogs.com/prawfsblawg/2006/07/nyt_v_burt_neub.html, Exhibits 12, 13, and 14.

Mr. Neuborne Seeks Compensation from Class Funds for Actions Adverse to Class Members' Interests. Objectors reject the extraordinary representational structure whereby Mr. Neuborne undertook a number of different roles, some of which are adversarial to the class, and now seeks to be paid from class funds for that abandonment. There is no legal or moral reason to tax plaintiff class members for funds to pay a lawyer to oppose their rights and interests, especially one who betrayed those very plaintiffs and spent years and buckets of ink defending his adversarial stance on the grounds that it was justified by his "pro bono" role and his lack of financial interest in the settlement outcomes. Such fiction now exposed, cannot be rewarded.

This bizarre turn of events was highlighted after the U.S. Survivors filed their initial allocation brief in the Second Circuit, and has been made even more explicit after that time. In response to an inquiry from a Second Circuit clerk asking who Mr. Neuborne represented in the appeal, the District Court wrote: "Professor Neuborne does not represent any party in the context of the current appeals. By submitting briefs, Professor Neuborne is simply providing an adversarial defense of my position for the benefit of the Second Circuit. In this sense, his current role is analogous to that of a lawyer who might be appointed to defend a judge's decision after a writ of mandamus." *In re Holocaust Victims Asset Litig.*, 2004 WL 3710212 (E.D.N.Y. Sept. 13, 2004).

Mr. Neuborne's response was more nuanced but equally troubling. He wrote: "I . . . take issue with your statement that I do not represent any party in the context of these appeals. . . . [W]hen I accepted your request that I serve as Lead Settlement Counsel, I entered into an intense attorney-client relationship with the class that continues to this day. Thus, when I appear in defense of your rulings, I do not appear as a functionary of the Court, but as Lead Settlement Counsel for the plaintiff-classes with a duty to defend your rulings as long as they are supported by law, or rest within your discretion." Letter from Burt Neuborne to Hon. Edward R. Korman, September 14, 2004. Exhibit 12 to March 2006 Opposition Memo.

Lead Counsel's conception of his role as defender of the District Court was an apparent outgrowth of the mechanism chosen at the settlement stage when the district court determined separate counsel were not necessary despite *Amchem* and *Ortiz*. Despite his "intense attorney-client relationship with the class," Mr. Neuborne simultaneously eschewed any responsibility to advocate for class members injured by court decisions, even if he disagreed with those decisions:

> I have sought to facilitate open communication between any member of the class and the Special Master, as well as the Court. I have advised Class members on the best way to present their concerns to the Court. I have provided the Court with personal views on allocation and distribution

> decisions. *But, most of all, I have committed myself to defending the results of the process, even when I do not wholly agree with the outcomes.*

Id. (Emphasis supplied).

Such a curious role for a "Lead Plaintiffs' Counsel" was impossible for class members to understand, at least until Mr. Neuborne filed his fee petition. That explained everything, because rather than undertake to carry out his clear-cut ethical obligation to advocate for what he believed was right for his "clients" he chose to defend the position of the Judge from whom he was expecting millions of dollars of "lodestar compensation (in addition to his academic salary and the $4.5 million he had received from the private German arbitration in 2001).

Mr. Neuborne's fee petition reveals that he did in fact disagree with the Special Master and District Court over the Looted Assets class allocations, but chose to support their preferences even though he believed the U.S. and Israeli survivors were entitled to greater Looted Assets allocations: In his March 17, 2006 Declaration, he states:

> Mr. Dubbin and his clients unfairly excoriate Lead Settlement Counsel for 'betraying' American survivors because Lead Settlement Counsel defended the Court's allocations whether or not he personally agreed with them. In fact, as the Court knows, Lead Settlement Counsel has consistently urged larger allocations for poor survivors in Israel and the United States, but . . . he was unable to persuade the District Court to accept his personal views. Moreover, Lead Settlement Counsel has urged the Court to make secondary distributions from potentially unused deposited assets funds similar to those urged by Mr. Swift, but has been unable to persuade the Court to do so. Since both sets of decisions clearly lay within the discretion of the District Court, Lead Settlement Counsel accepted the Court's decisions, and enforced them on behalf of the class as a whole, only to be unfairly charged with "betrayal" and other improper conduct by Mr. Dubbin and Mr. Swift.

March 17, 2006 Declaration, at 58-59. In other words, Mr Neuborne disagreed but went along despite the real injury to the people – his clients – he believed deserved better. What kind of advocate does that? This statement, in a nutshell, encompasses the very lack of adequate representation experienced by the U.S. Survivors and articulated in their opposition to the Special Master's second supplemental recommendation in the fall of 2003, which became crystallized in Mr. Neuborne's description of the choice he made to defend the Judge in his letter following the Second Circuit clerk's inquiry. It is now clear that Mr. Neuborne had 4.1 million reasons to make that choice. Why should he be paid from the settlement fund?

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701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847 • TELEPHONE (305) 357-9036

V. Recovery is Limited to 600 Hours Which Allegedly Generated Monetary Benefit.

According to the standards previously urged by Mr. Neuborne in evaluating other fee requests, services rendered are not compensable from class settlement funds unless they produce a material benefit for the class. Neuborne July 2003 Declaration, at 7-8. The District Court adopted this standard. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d 363, 376, 381, 382 (E.D.N.Y. 2004)("Not all work is entitled to be compensated, even when that work is done in the context of a lawsuit.").[11] Other courts routinely deny counsel fees for work that does not materially benefit the class. *See, e.g. Kaplan v. Rand*, 192 F.3d 60, 71 (2d Cir. 1991); *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171, 175-76 (3d Cir. 2001).

Inasmuch as there have been no new legal or factual issues raised after the parties' March 17, 2006 submissions, the U.S. Survivors will rely on pages 34-40 of their March 2006 Opposition Memo in support of this argument that any recovery by Mr. Neuborne should be limited to the 600 hours stipulated that he worked on matters which he claims increased the value of the settlement fund by some $50 million. As is well-documented in the prior memorandum, the U.S. Survivors question even the "value" Mr. Neuborne claims to have created. However, given the prior positions taken by Mr. Neuborne and the District Court, and recalling the doctrine of judicial estoppel discussed in Section II, it is clear that Mr. Neuborne's recovery can not exceed whatever hourly rate the Court adopts times 600 hours.

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[11] Mr. Neuborne stated previously: "I do not contest the fact that [counsel] has expended substantial time on Holocaust-related issues, including the scope of the insurance releases in this case. I do not believe, however, that the plaintiff-class can be turned into in involuntary client with an obligation to pay [counsel] more than the economic value of [counsel's] services merely because [counsel] has expended time." Letter from Burt Neuborne, Esquire, to Hon. Edward R. Korman, September 9, 2003.

Objectors would ordinarily support reasonable compensation for lawyers' work that opened the door for potential recovery and enhanced the historical record and the transparency of restitution efforts, even if monetary benefits did not immediately result. *See, e.g., Koppel v. Wien*, 743 F.2d 129 (2d Cir. 1984). However, Mr. Neuborne is judicially estopped from having a different standard apply to his fee request than the one he urged for others and which the District Court adopted.

DUBBIN & KRAVETZ, LLP
701 BRICKELL AVENUE • 16TH FLOOR • MIAMI, FLORIDA 33131-2847 • TELEPHONE (305) 357-9036

Respectfully submitted:

Samuel J. Dubbin, P.A.

Samuel J. Dubbin, P.A.
Florida Bar No. 328189

Dubbin & Kravetz, LLP
701 Brickell Avenue, Suite 1650
Miami, Florida 33131
(305) 371-4700 (phone)
(305) 371-4701 (fax)
sdubbin@dubbinkravetz.com

cc: Robert A. Swift, Esquire
Samuel Issacharoff, Esquire